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ZULKIFLI ARSHAD

v.

PP

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COURT OF APPEAL, PUTRAJAYA
ZULKEFLI MAKINUDIN JCA
ABDULL HAMID EMBONG JCA
KN SEGARA JCA
[CRIMINAL APPEAL NO: J-05-39-04]

C

8 AUGUST 2007

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Appeal against conviction and sentence - Whether trial judge misdirected himself in law - Distinct and separate charges - Direct evidence of trafficking - Presumption of trafficking - Dangerous Drugs Act 1952, ss. 2, 37(da)(vi)*

D

The appellant was convicted and sentenced to death at a joint trial at the High Court in respect of two separate charges of trafficking in cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'). The first charge related to the offence of trafficking in 5796.7 grams of cannabis, in car No. JCQ 2852 ('car'), on 27 January 2001, at about 1am, beside one Sharp-Roxy factory at Km 10, Jalan Kluang, Sri Gading, Batu Pahat. The second charge pertained to trafficking in 3867.2 grams of cannabis, in house No. PS 31-3, Parit Sengkuang, Jalan Kluang, Sri Gading ('house') on 27 January 2001, at about 1.30am. The police had, after ambushing the appellant, arrested him after discovering a black Nike sports bag containing cannabis in his car. After interrogating the appellant, the police and the appellant proceeded to the house where the police found cannabis in the 3rd bedroom of the house. The trial judge held that a *prima facie* case had been made out against the appellant and called for the appellant to enter his defence, subsequently finding him guilty on both charges. The appellant submitted that the trial judge had misdirected himself in law in deciding that the appellant was trafficking in the drugs since he had wrongly taken into consideration the combined weight of the cannabis in the two separate charges against the appellant. The appellant further submitted that the trial judge had misdirected himself in holding that there was actual possession and

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actual trafficking, and in calling upon the appellant to enter his defence to a charge of trafficking without invoking s. 37(da)(vi) of the Act.

Held (allowing the appeal and substituting both convictions under s. 39B(2) of the Act with convictions under s. 6 of the Act; appellant sentenced to 18 years imprisonment from date of arrest and ten strokes of rotan in respect of each charge; sentences to run concurrently)
Per KN Segara JCA delivering the judgment of the court:

(1) The trial judge had seriously misdirected himself in holding that because it was a joint trial of the 1st and 2nd charge against the appellant, the "evidence on record is seamless and indivisible and where the evidence on record is to be viewed and considered in totality and as a whole, in relation to both trafficking charges and to the question of whether it was just passive possession". The 1st charge and the 2nd charge were distinct and separate trafficking charges; one was trafficking in a car and the other, trafficking in a house. The evidence adduced by the prosecution did not directly or indirectly disclose that the appellant had any nexus to the drugs discovered in the house at 1.30am and the drugs discovered in the car at 1am. There was no evidence that anyone had observed the appellant taking out the black Nike sports bag out of the house and placing it in the car or, alternatively, had seen the appellant bring out the drugs from the house and keep it inside the black Nike sports bag in the car, and thereafter proceed to 10 Km Jalan Kluang and stop his car, with its engine kept running, beside the public telephones outside the Sharp-Roxy factory at about 1am. The trial judge, consequently, had misdirected himself in holding that there was direct (or actual) evidence of trafficking in relation to the 1st charge, contrary to the evidence adduced. The evidence adduced in relation to the 1st charge, at its highest, only justified a finding of the offence of possession under s. 6 punishable under s. 39A(2) of the Act, as the learned trial judge did not invoke the presumption of trafficking under s. 37(da)(vi) of the Act at the close of the prosecution's case. The presence of the drugs in the car, *per se*, in the absence of any evidence of any overt act in relation thereto by the appellant justifying such overt act to fall within the meaning of

A trafficking under s. 2 of the Act, could not amount to the offence of trafficking under s. 39B(1)(a) of the Act. (paras 16 & 17)

(2) With regard to the 2nd charge, the trial judge had also B misdirected himself in holding that there was direct evidence of trafficking against the appellant at the close of the prosecution's case, contrary to the evidence adduced. It was abundantly clear, on the evidence adduced by the prosecution, that the appellant was not arrested at the house, where the C drugs that were the subject matter of the 2nd charge were recovered. Although there was evidence that the appellant was a tenant of the house at the material time, there was also evidence from the landlord that he had retained a set of keys to the house when he let it to the appellant. In such D circumstances, the landlord certainly could have access to the house in the absence of any unequivocal term of the tenancy denying him access. Nevertheless, the trial judge made a finding that the appellant had "sole control and management" of the house and, consequently, possession of the drugs found E in the 3rd bedroom of the house. The trial judge then went on to find that there was direct evidence of trafficking activity in the house. By holding as such, the trial judge had clearly misdirected himself. His finding that the house was used for no other purpose than to keep the drugs was totally against F the weight of the evidence. There was no evidence at all that the appellant had taken anything, let alone drugs, into the house after the landlord had given him a set of the keys. It was, on the facts, hardly 14 days since he received the keys and there was no evidence as to when the appellant went G into actual physical possession or occupation of the house. The appellant was not arrested at the house but elsewhere, whilst he was in his car at 10 Km Jalan Kluang and not in physical contact with the drugs. There was no evidence, direct or circumstantial, that the drugs were kept or stored by the H appellant in the 3rd bedroom of the house. There was no evidence of any overt act by the appellant, at anytime, in relation to the drugs found in the 3rd bedroom, falling within the context of the definition of "trafficking" in s. 2 of the Act. (paras 20, 21 & 22)

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Bahasa Malaysia *Translation Of Headnotes*

Dalam satu perbicaraan bersama di Mahkamah Tinggi, perayu telah disabit dan dihukum mati atas dua pertuduhan berasingan mengedar cannabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pertuduhan pertama adalah kerana mengedar 5796.7 gram cannabis di dalam kereta No. JCQ 2852 ('kereta') bersebelahan dengan kilang Sharp-Roxy di Km 10, Jalan Kluang, Sri Gading, Batu Pahat pada lebih kurang jam 1 pagi 27 Januari 2001. Pertuduhan kedua pula menyangkuti pengedaran 3867.2 gram cannabis di rumah No. PS 31-3, Parit Sengkuang, Jalan Kluang, Sri Gading ('rumah') pada lebih kurang jam 1.30 pagi 27 Januari 2001. Pihak polis, setelah menyerang hendap perayu, telah menangkap perayu setelah menjumpai satu beg sport Nike hitam yang mengandungi cannabis di dalam keretanya. Selepas menyoal-siasat perayu, pihak polis dan perayu telah pergi ke rumah dan di situ pihak polis menjumpai cannabis di dalam bilik ketiga rumah. Hakim bicara memutuskan bahawa kes *prima facie* telah dibuktikan terhadap perayu dan, setelah memanggil perayu untuk membela diri, telah mensabitkan perayu atas kedua-dua pertuduhan. Perayu berhujah bahawa hakim bicara telah tersalah arah akan dirinya di sisi undang-undang apabila memutuskan bahawa ia telah mengedar dadah berkenaan kerana hakim bicara telah dengan salahnya mengambilkira keseluruhan berat cannabis di dalam kedua-dua pertuduhan. Juga dihujahkan bahawa hakim bicara telah tersalah arah akan dirinya dalam memutuskan bahawa terdapat milikan dan pengedaran sebenar, dan dalam memanggil perayu untuk membela diri di akhir kes pendakwaan tanpa membangkitkan anggapan pengedaran di bawah s. 37(da)(vi) Akta.

Diputuskan (membenarkan rayuan dan mengganti kedua-dua sabitan di bawah s. 39B(2) Akta dengan sabitan di bawah s. 6 Akta; perayu dihukum 18 tahun penjara dari tarikh tangkap dan sepuluh sebatan atas setiap pertuduhan; hukuman berjalan serentak)

Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah tersalah arah akan dirinya dengan serius apabila memutuskan bahawa, oleh kerana ini adalah satu perbicaraan bersama pertuduhan-pertuduhan pertama dan kedua terhadap perayu, "keterangan pada rekod adalah tidak berbatas dan tidak berbelahbagi dan dimana keterangan pada

A rekod perlu dilihat dan ditimbang secara keseluruhan, dalam hubungan dengan kedua-dua pertuduhan pengedaran dan kepada persoalan sama ada ia hanyalah suatu milikan pasif". Pertuduhan pertama dan kedua adalah pertuduhan-pertuduhan pengedaran yang berasingan; satu kerana mengedar di dalam B kereta sementara satu lagi adalah mengedar di dalam rumah. Keterangan yang dikemukakan oleh pendakwaan secara langsung atau sebaliknya tidak menunjukkan bahawa perayu mempunyai apa-apa hubungan dengan dadah yang dijumpai di dalam rumah pada jam 1.30 pagi dengan dadah yang dijumpai C di dalam kereta pada jam 1 pagi. Tidak terdapat keterangan bahawa ada orang yang melihat perayu membawa keluar beg sport Nike hitam dari rumah dan meletakkannya di dalam kereta atau, secara alternatifnya, melihat perayu membawa keluar dadah dari rumah dan menyimpankannya di dalam beg D sport Nike hitam di dalam kereta, dan kemudian pergi ke Km 10 Jalan Kluang dan memberhentikan kereta bersebelahan dengan telefon awam di hadapan kilang Sharp-Roxy pada lebih kurang jam 1 pagi, dengan enjin kereta masih hidup. Hakim bicara, dengan itu, telah tersalah arah akan dirinya apabila E merumuskan bahawa terdapat keterangan langsung (atau sebenar) pengedaran dalam pertuduhan pertama, yang mana ia adalah bertentangan dengan keterangan yang dikemukakan. Keterangan yang dikemukakan berhubung pertuduhan pertama, pada peringkatnya yang tertinggi sekalipun, hanya mewajarkan F dapatan kesalahan milikan di bawah s. 6 yang boleh dihukum di bawah s. 39A(2) Akta, memandangkan yang arif hakim bicara tidak mengenakan anggapan pengedaran di bawah s. 37(da)(vi) Akta di akhir kes pendakwaan. Kehadiran dadah di dalam kereta, *per se*, dalam ketiadaan sebarang keterangan G tentang apa-apa tindakan terang-terangan perayu mengenainya yang membolehkan tindakan yang sedemikian itu terjatuh ke dalam maksud mengedar di bawah s. 2 Akta, tidak boleh menjadikannya satu kesalahan mengedar di bawah s. 39B(1)(a) Akta.

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(2) Berhubung pertuduhan kedua, hakim bicara telah tersalah arah akan dirinya dalam memutuskan bahawa terdapat keterangan langsung pengedaran terhadap perayu di akhir kes pendakwaan, yang mana ini juga bertentangan dengan keterangan yang I dikemukakan. Berdasarkan keterangan yang dikemukakan pendakwaan, amat jelas bahawa perayu tidak ditangkap di

rumah, di mana dadah yang menjadi halperkara pertuduhan kedua dijumpai. Walaupun ada keterangan bahawa perayu adalah penyewa rumah pada waktu material, terdapat juga keterangan oleh tuan rumah bahawa beliau menyimpan satu set kunci rumah sewaktu ia menyewakan rumah kepada perayu. Dalam keadaan sedemikian, tuan rumah semestinya mempunyai akses kepada rumah dalam ketiadaan apa-apa terma jelas tenansi yang menghalang akses kepadanya. Walau apapun, hakim bicara telah membuat dapatan bahawa perayu mempunyai "kawalan dan pengurusan penuh" terhadap rumah dan kerana itu, mempunyai milikan dadah yang dijumpai di dalam bilik ketiga rumah. Hakim bicara kemudian mendapati bahawa terdapat keterangan langsung aktiviti pengedaran di dalam rumah. Dengan mendapati sedemikian, hakim bicara jelas telah tersalah arah akan dirinya. Dapatannya bahawa rumah tidak digunakan untuk lain-lain tujuan kecuali untuk menyimpan dadah adalah bercanggah dengan arus keterangan. Tidak terdapat sebarang keterangan bahawa perayu telah membawa sesuatu, sementelah pula dadah, ke dalam rumah selepas tuan rumah memberikan set kunci kepadanya. Fakta menunjukkan bahawa semuanya berlaku selepas 14 hari beliau menerima kunci dan tidak terdapat bukti bilakah sebenarnya perayu mula menduduki atau mengambil milikan fizikal rumah. Perayu tidak ditangkap di rumah tetapi di tempat lain, iaitu semasa beliau berada di dalam kereta di Km 10, Jalan Kluang dan dalam keadaan di mana beliau tidak berada dalam kontak fizikal dengan dadah. Tidak ada keterangan, sama ada keterangan langsung mahupun keterangan ikut keadaan, bahawa dadah telah disimpan atau diletak di dalam bilik ketiga rumah oleh perayu. Tidak ada keterangan tentang apa-apa perbuatan terang-terangan perayu, pada bila-bila masa pun, berhubung dadah yang dijumpai di dalam bilik ketiga, yang termasuk di dalam konteks definasi "pengedaran" di bawah s. 2 Akta.

Case(s) referred to:

PP v. Lin Lian Chen [1991] 1 MLJ 361 ***(refd)***

PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***

Yusmarin Samsudin v. PP [1999] 4 CLJ 391 CA ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 6, 37(da)(vi), 39A(2), 39A(2)(f), 39B(1)(a), (2)

A *For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co*
For the respondent - Eddie Yeo DPP

[Appeal from High Court, Muar; Criminal Trial No: 45-22-2001 & 45-23-2001]

B *Reported by Suresh Nathan*

JUDGMENT

C **KN Segara JCA:**

[1] The appellant was convicted and sentenced to death at a joint trial at the Muar High Court in respect of 2 separate charges under s. 39B(1)(a) Dangerous Drugs Act 1952(the Act) for
D trafficking in cannabis.

[2] In criminal trial No: 45-22-2001 the charge (hereinafter referred to as the "1st charge") relates to the offence of trafficking in 5796.7 grams of cannabis, in car No. JCQ 2852, on 27 January 2001, at about 1am, beside Sharp-Roxy factory at Km. 10, Jalan
E Kluang, Sri Gading, Batu Pahat. The 1st charge reads:

> Bahawa kamu pada 27.1.2001 jam lebih kurang 1.00 pagi, di dalam kereta No. Pendaftaran JCQ 2852 di tepi Kilang Sharp Roxy, Km 10, Jalan Kluang, Sri Gading, Batu Pahat, di dalam
F daerah Batu Pahat, di dalam Negeri Johor, Darul Ta'zim, bagi pihak diri kamu sendiri atau bagi pihak sesiapa telah didapati mengedar dadah berbahaya jenis cannabis, sejumlah berat 5,796.7 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B (2) Akta yang sama.

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[3] In criminal trial No: 45-23-2001 the charge (hereinafter referred to as the "2nd charge") relates to trafficking in 3867.2 grams of cannabis, in house No. PS 31-3, Parit Sengkuang, Jalan Kluang, Sri Gading on 27 January 2001, at about 1.30am. The
H 2nd charge reads:

> Bahawa kamu pada 27.1.2001 jam lebih kurang 1.30 pagi, di rumah beralamat PS 31-3, Parit Sengkuang, Jalan Kluang, Seri Gading, Batu Pahat, di dalam daerah Batu Pahat, di dalam Negeri Johor Darul Ta'zim, bagi pihak diri kamu sendiri atau bagi pihak
I sesiapa telah di dapati mengedar dadah berbahaya jenis cannabis sejumlah berat 3,867.2 gram, dan dengan itu kamu telah

melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B (2) Akta yang sama.

[4] In this appeal before us, at the very outset, counsel for the appellant submitted that the trial judge had misdirected himself in law in deciding that the appellant was trafficking in the drug as he had wrongly taken into consideration the combined weight of the cannabis in the two separate trafficking charges against the appellant. Counsel for the appellant further submitted, that the trial judge had misdirected himself in holding there was actual possession and actual trafficking and, that he had failed to invoke the presumption of trafficking under s. 37(da)(vi) of the Act at the close of the case for the prosecution. After a careful perusal of the evidence recorded at the trial and the grounds of judgment, we agree with learned counsel for the appellant that the learned judge had misdirected himself in calling upon the appellant to enter his defence to a charge of trafficking without invoking s. 37(da)(vi) of the Act. At the conclusion of the hearing we unanimously allowed the appeal, quashed the convictions and set aside the death sentences. As conceded by counsel on behalf of the appellant, which we considered justified, we substituted therefore a conviction under s. 6 of the Act for the 1st and 2nd charge and, after hearing the plea in mitigation, sentenced the appellant (pursuant to s. 39A(2)(f) of the Act) to imprisonment for a term of 18 years with effect from the date of his arrest and 10 strokes of the rotan, in respect of each charge, the sentence of imprisonment for both the charges to run concurrently.

[5] Briefly, the case for the prosecution is this.

[6] On 27 January 2001, at about 12.10am, acting on information received, C/I Ramesh a/l Nagayah (SP7) briefed a team of 9 police personnel to lay ambush and take up positions in 3 locations, each about 1/2 Km. apart from the other. The 3 locations were Km. 9.5, Km. 10 and Km.10.5 Jalan Kluang/Batu Pahat. All of them were not wearing police uniform when they proceeded in 3 vehicles to their respective positions, assigned by SP7, after the briefing was over, at about 12.35am.

[7] SP7 and D/Kpl Jayarajan (SP10) were to proceed to a car JCQ 2852 at Km. 10, near the Sharp-Roxy factory. SP7 proceeded to Km. 10, together with SP10, in a car driven by SP7 and, as soon as he arrived near the Sharp-Roxy factory he saw car JCQ 2852, a white Proton Iswara, parked near the public

telephones with its engine running and, the car was facing the direction of Jalan Kluang. SP7 stopped his car about 1-2 meters behind car JCQ 2852 and instructed SP10 to get out of his car, proceed to m/car JCQ 2852 and, gain entry into the said car *via* the front passenger's door. At about the same time, SP7 also got out of his car and proceeded to the driver's door of car JCQ 2852.When he arrived besides the driver's door, he saw a male Malay (the appellant) seated at the driver's seat. The driver's door window was open. He saw SP10 open the front passenger door and enter the car. At that moment, SP7 reached his hand into the car for the ignition key, switched off the engine and removed the ignition key. He then introduced himself as police. The appellant attempted to open the driver's door but SP10, who was now inside the car, prevented him from doing so.

[8] SP7 opened the driver's door and ordered the appellant to get out of the car. SP10 also got out of the car and stood guard over the appellant who was now standing near the driver's door of car JCQ 2852. SP10 carried out a physical search and examination of the appellant but did not find any drugs on the person of the appellant. SP7 then carried out an inspection and search of car JCQ 2852.

[9] SP7 saw a black NIKE sports/travelling bag positioned in the middle of the back passenger seat. He removed the bag and placed it on the road near the driver's door. He then unzipped the bag. At that moment a struggle occurred between SP7 and the appellant, upon SP7 perceiving that the appellant intended to run away. Thereafter, SP7 examined the bag in the presence of the appellant who was beside him, with SP10 keeping guard of the appellant. Inside the black NIKE bag SP7 found 6 compressed slabs of plant material, subsequently confirmed by the chemist (SP9) to be 5796.7 grams of cannabis, the subject matter of the 1st charge. Upon discovery of the 6 compressed slabs in the NIKE bag, SP7 instructed SP10 to handcuff the appellant. SP7 then called all the members of his police party, from their respective assigned positions, to come over to the scene where he was with SP10 and the appellant.

[10] After all the members of the police party had gathered at the scene of arrest of the appellant, SP7, together with Inspector Balan and Inspector Arshad, made a further thorough examination of car JCQ 2852 but, did not discover anything incriminating the appellant.

[11] It was in evidence that Jamari bin Diron (SP4), who owned the car JCQ 2852, had handed the car to Azhari bin Harun (SP6) to be sold. SP6 testified that he sold the car to the appellant, who paid an initial deposit of RM2,000.

[12] After that, still at the same scene, in the presence of all the members of the police party, SP7 interrogated the appellant. No caution appears to have been administered to the appellant before he was questioned. No admissions appear to have been made by the appellant to SP7 during the interrogation at the scene. After the interrogation, SP7 and his police party, together with the appellant, proceeded to house No. PS31-3, Parit Sengkuang, Jalan Kluang, Batu Pahat. They arrived there at about 12.50am.

[13] SP7 seized a bunch of keys from the rear left pocket jeans that the appellant was wearing and, opened the grille door and wooden door of house PS31-3. The house was in darkness. There were no occupants. SP7 switched on the house lights. The house was empty, devoid of any furniture, clothing, documents, and household or personal items to suggest the house was in occupation by anyone at the material time. There were 3 rooms. The doors of the 1st and 2nd room were open and the rooms were empty. The door of the 3rd room was locked. Using a key from the bunch of keys seized from the appellant, SP7 unlocked the door of the 3rd room and they entered the room. In one corner of the room was a grey plastic sheet and, underneath the sheet were 4 compressed slabs of plant material, subsequently confirmed by the chemist to be 3867.2 grams of cannabis, the subject matter of the 2nd charge.

[14] Goo Kwan Leng (SP3), the landlord of house No. PS 31-3 testified that in mid January, 2001, he let the house to the appellant. He gave a set of the house keys to the appellant in mid January as well. He retained a set of the keys for himself but there was no evidence whether he had brought this fact to the attention of the appellant. SP3 did not know when the appellant went into occupation of the house after he had handed to him a set of the keys. The appellant did not tell SP3 when he actually intended to occupy the house. There was no written tenancy agreement between SP3 and the appellant.

[15] On the above evidence, the learned trial judge held that a *prima facie* case had been made out against the appellant. He did not invoke any of the statutory presumptions of the Act to make out a case of possession or trafficking against the appellant, at the close of the case for the prosecution. The learned trial judge then called upon the appellant to enter upon his defence. In his grounds of judgment the learned judge stated, *inter alia*:

> It was clearly proved that the accused was the sole occupant of JCQ 2852, and that the black bag and the contents of cannabis were on the rear passenger seat of the said car that belonged to him. It was clearly proved that the accused had custody and control of JCQ 2852 at the material time, given the undisputed evidence that the accused was the sole occupant and was seated on the driver seat of a car with its engine running at the material time. It was clearly proved that cannabis was recovered from a house that was under the sole control and management of the accused. The latter was proved by the following undisputed facts; (i) that the accused was the tenant of PS31-3, (ii) that the accused had possession of the keys to PS31-3 and the 3rd bedroom, and, (iii) that PS31-3 was a bare and empty house totally bereft of all signs or articles of any human habitation or occupation, which condition and state of PS31-3 said that there could not have been other tenants, other occupiers or other users of PS31-3 and further said the accused must have had exclusive possession of PS31-3. *That the accused had exclusive possession of PS 31-3 and the keys to the 3rd bedroom must lead to the inevitable deduction that the accused had possession of the drugs in the 3rd bedroom.* (emphasis added)
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> The prosecution had also proved the concurrent presence of drugs in a house under the control and management of the accused at about the same time that the accused was in possession of similar drugs at the 10 Km Jalan Kluang. And this is a joint trial, where the evidence on record is seamless and indivisible, and where the evidence on record is to be viewed and considered in totality and as a whole, in relation to both trafficking charges and to the question of whether it was just passive possession.
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> …
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> Rather, the evidence adduced by the prosecution proved that the accused was keeping and or storing drugs in house PS31-3. And proof of that activity made it wholly implausible that the possession of drugs of such a substantial quantity by the accused

in JCQ 2852 could have been mere possession. The aforesaid maximum evaluation of the prosecution evidence showed that the prosecution had proved the facts and circumstances for to say that the accused was trafficking. Even without legal presumptions, there was clear, strong, and most credible evidence to each ingredient of each charge. The evidence adduced was more than sufficient to warrant an answer. On both counts, there was a *prima facie* case to answer.

[16] The learned trial judge seriously misdirected himself in holding that because it was a joint trial of the 1st and 2nd charge against the appellant, the "evidence on record is seamless and indivisible and where the evidence on record is to be viewed and considered in totality and as a whole, in relation to both trafficking charges and to the question of whether it was just passive possession."

[17] The 1st charge and 2nd charge are distinct and separate trafficking charges; one is trafficking in a car and the other, trafficking in a house. The evidence adduced by the prosecution did not directly or indirectly disclose that the appellant had any nexus to the drugs discovered in house No PS31-3 at 1.30am and, the drugs discovered in car JCQ 2852 at 1am. There was no evidence that anyone had observed or seen the appellant to have taken the black bag out of house No. PS 31-3 and place it on to the rear seat of car JCQ 2852 or alternatively, saw him bring out 4 packages from the said house and keep it inside the black bag on the rear seat of the car and, thereafter proceed to 10 Km Jalan Kluang and stop his car, with its engine kept running, besides the public telephones outside the Sharp/Roxy factory at about 1am. The learned trial judge, consequently, has misdirected himself in holding that there was direct(or actual) evidence of trafficking in relation to the 1st charge, contrary to the evidence adduced. The evidence adduced at its highest, in relation to the 1st charge, only justifies a finding of the offence of possession under s. 6 punishable under s. 39A(2) of the Act, as the learned trial judge did not invoke the trafficking presumption under s. 37(da) (vi) of the Act, at the close of the prosecution's case to bring home the offence of trafficking. The presence of the drug in the car, *per se*, in the absence of any evidence of any overt act in relation thereto by the appellant justifying such overt act to fall within the meaning of trafficking under s. 2 of the Act, cannot amount to the offence of trafficking under s. 39B(1)(a) of the Act.

[18] In *Yusmarin bin Samsudin v. PP* [1999] 4 CLJ 391, the appellant was convicted for trafficking in 2,863.1 grams of cannabis and sentenced to death. The undisputed evidence showed that the offending drug was found in four plastic packages that were placed in an unlocked black bag and that black bag was found unconcealed on the back seat of the car driven by the appellant. The car belonged to the appellant's father but he was alone when the car was stopped and searched by the police. The Court of Appeal held:

> Before us, he appealed against both his conviction and sentence. In the light of such circumstantial evidence, we had found that the trial judge had misdirected himself when he ruled that trafficking had been proved. On the contrary, we consider that the prosecution evidence merely supports the lesser offence for possession, … as the presence of the drug in the car, *per se*, cannot amount to trafficking. See the case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 (SC).
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> It was under those circumstances that we had allowed the appellant's appeal against his conviction for trafficking and substituted it to that of being in possession of the dangerous drug under s. 12(2) of the Act, and sentenced him to 18 years imprisonment to take effect from the date of his arrest and 12 strokes of the rotan under s. 39A(2)(f) of the Act.

[19] In *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 a party of police officers ambushed and arrested the respondent as soon as he had parked his car in Stadium Negara Car Park, Kuala Lumpur. The car was immediately searched and recovered from the foot-well of the car's rear nearside passenger seat was a plastic bag containing six newspaper packages, each of which contained a pink granular substance. A second search of the car subsequently resulted in the recovery of: another newspaper package containing a pink granular substance in the glove compartment; the registration card and car licence of the car, both in the name of Lim Hooi Yong; several business cards bearing the name of James Goh Liong Sin and a cigarette packet on the dashboard containing six cigarettes, each of which had traces of heroin. When the pink powdery substance was analysed by the chemist, it was found to contain in all 578.94 g of heroin. The Supreme Court held, *inter alia*, that although the respondent was the sole occupant of the motor car, being the driver and therefore in charge of it, he was not its owner and there was no

evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet which contained the offending exhibits. The evidence against the respondent amounted only to grave suspicion and is insufficient to attract the presumption of custody and control under s. 37(d) of the Act. On this ground alone the learned judge was entitled to rule, at the close of the prosecution case, that the respondent had no case to answer and acquit and discharge him.

[20] Now, returning to the present appeal before us, with regard to the 2nd charge, we find that the learned trial judge has also misdirected himself in holding there was direct evidence of trafficking against the appellant at the close of the prosecution's case, contrary to the evidence adduced. It is abundantly clear, on the evidence adduced by the prosecution, that the appellant was not arrested at the house, PS31-3, where the drugs the subject matter of the 2nd charge were recovered. Although there was evidence he was a tenant of the house at the material time, there was evidence from the landlord that the landlord had retained a set of keys to the house when he let the house to the appellant. In such circumstances, the landlord certainly could have access to the house in the absence of any unequivocal term of the tenancy denying him access. Nevertheless, the learned trial judge made a finding that the appellant had "sole control and management" of the house PS31-3, exclusive possession of PS31-3 and, consequently possession of the drugs found in the 3rd bedroom, when he stated in his grounds of judgment as follows:

> It was clearly proved that the cannabis were recovered from a house that was under the sole control and management of the accused. The latter was proved by the following undisputed facts; (i) that the accused was the tenant of PS31-3, (ii) that the accused had possession of the keys to PS31-3 and the 3rd bedroom, and, (iii) that PS31-3 was a bare and empty house totally bereft of all signs or articles of any human habitation or occupation, which condition and state of PS31-3 said that there could not have been other tenants, other occupiers or other users of PS31-3, and further said that the accused must have had exclusive possession of PS31-3. That the accused had exclusive possession of PS31-3 and the keys to the 3rd bedroom must lead to the inevitable deduction that the accused had possession of the drugs in the 3rd bedroom.

[21] Having made a finding that the appellant was in possession of the drugs in the 3rd bedroom, the learned trial judge went on to make the following finding:

> But in that house and on the floor of a locked room were 4 slabs of drugs lying on top of newsprint but underneath a large grey plastic sheet. The 4 slabs of drugs were found in a state of camouflage. Given that state of camouflage and the undisputed fact that the house was otherwise totally bare (other than the presence of a small paper box in the 2nd room), the reasonable deduction had to be that PS31-3 was used for no other purpose than to keep and or store the 4 slabs of drugs. There could be no other reasonable or plausible deduction. The fact of the matter is that there were simply no other articles or belongings in PS31-3 as could suggest that PS31-3 was used or could have been used for some other purpose than to keep and store the said 4 slabs of drugs. Those particular circumstances undoubtedly said that the house was used to keep and or store the said 4 slabs of drugs found in PS31-3. The Dangerous Drugs Act 1952 provides that "trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling giving receiving storing administering, transporting, carrying, sending, delivering, procuring, supplying or distributing dangerous drug." In the case of the 4 slabs of drugs in PS31-3, there was direct evidence of trafficking. And that direct evidence of trafficking activity in PS31-3 said that it was totally implausible that the drugs in the car could have been for personal consumption.

[22] The learned trial judge has clearly misdirected himself in holding that there was direct evidence of "trafficking activity in PS31-3". The learned trial judge's finding that "PS31-3 was used for no other purpose than to keep or store the 4 slabs of drugs" is totally against the weight of the evidence. There was no evidence at all that the appellant had taken anything, let alone drugs, into the house after the landlord had given him a set of the keys. It was hardly 14 days since he received the keys. There was no evidence as to when the appellant went into actual physical possession or occupation of the house. The appellant was not arrested at the house but, elsewhere whilst in his car at the 10 Km Jalan Kluang and, was not in physical contact with the 4 slabs of drug. There was no evidence, direct or circumstantial, that the drugs were kept or stored by the appellant in the 3rd bedroom. There was no evidence of any overt act by the

appellant, at anytime, in relation to the drugs found in the 3rd bedroom, falling within the context of the "trafficking" definition in s. 2 of the Act.

[23] For the above reasons we find the learned trial judge has misdirected himself in holding that there was actual (direct) evidence of trafficking in respect of each of the charges. We, therefore, allow this appeal. Both the convictions and sentences under s. 39B(2) of the Act are set aside. We substitute, therefore, a conviction under s. 6 of the Act for both the charges. The appellant is sentenced to 18 years imprisonment from date of arrest and 10 strokes of the rotan, in respect of each charge. The term of imprisonment for both the charges is to run concurrently.